Supreme Court of Michigan.

THE PEOPLE *v.* VALENTINE CORNWELL.

Although rape can only be accomplished by force, and with the utmost reluctance and resistance on the part of the woman, yet no more resistance can be required in any case than her condition will enable her to make; and if she be insensible, or unconscious of the nature of the act, or for any reason not a willing participator, the slight degree of physical force necessary to accomplish carnal knowledge is sufficient to constitute the offence.

If the woman's consent is obtained by fraud, the nature of the act is the same as if consent had been extorted by threats or resistance overcome by force.

But where the carnal intercourse is not against the woman's desire, and no circumstance of force or fraud accompanies the act, the crime of rape is not committed, notwithstanding the woman was at the time not mentally competent to exercise an intelligent will.

On exceptions from the Kalamazoo Circuit Court.

N. A. Balch, for defendant.

A. Williams, Attorney-General, for The People.

Cooley, J.—The defendant was informed against in the Circuit Court for the county of Kalamazoo for rape, alleged to have been committed upon one Mrs. Crittenden. The information was in all respects in the usual form.

On the trial evidence was given that four persons walking in the road through or past a piece of woods, saw Mrs. Crittenden and the defendant in the woods together a few rods off; Mrs. Crittenden at the time lying upon her back with her person exposed, and the defendant on his knees before her; that he did not have hold of her, or seem to be exercising any control, nor she to be making any resistance; that sexual intercourse took place between them, after which, on some slight noise being made by the witnesses, the defendant got up and ran off, while Mrs. Crittenden came out towards the witnesses smiling, and followed them to a house in the neighborhood where they were going to visit.

The prosecution then offered evidence to show that Mrs. Crittenden at the time was insane. The defendant objected to this as irrelevant, and also because, if insanity was a material fact, it should have been alleged in the information. The court overruled the objection, and the defendant excepted.

The evidence given to establish insanity showed that Mrs. Crittenden was forty-eight or forty-nine years of age, in apparent good health, of good size and strength; that she had been in the asylum for the insane at Kalamazoo the preceding year, but was at this time residing at home with her husband; that she worked some at home, but appeared to be uneasy, and said she ought to be doing something, but did not know what to do. The most pointed testimony was that of E. H. Van Duzen, the physician who was in charge of the asylum while Mrs. Crittenden was there, who testified that she was in a state of dementia; not idiotic, but approaching towards it; that she had vague apprehensions of injury, and a predisposition to be with men; a morbid rather than an active desire to have sexual intercourse; that that was one way in which her insanity manifested itself; that she was dismissed from the asylum not much improved, but under better control, and with more method in her conduct; and that her general health was pretty good. The witness did not think she had an intelligent understanding at the time the crime was charged to have been committed.

The court below, at the conclusion of the evidence, charged the jury, that if the woman was so suffering from mental disease at the time as to have no intelligent will to oppose to the act of the prisoner, and he knew of this her condition, then her failure to oppose him, or her seeming acquiescence, could not be urged against a conviction; and that if he made the attempt upon her person, with the intent to have carnal intercourse, and she did not resist because she had no intelligent will to oppose, he was guilty of the offence charged. Under these instructions the jury returned a verdict of guilty.

The exceptions present to us questions which we do not find distinctly passed upon in any adjudged case. The main question, and the only one we deem it necessary to discuss, is, Whether the carnal knowledge of a woman *non compos mentis*, under the circumstances disclosed in the testimony above stated, can be punished as rape under the statutes of this state?

Rape is defined to be "the carnal knowledge of a woman by force and against her will:" 1 East P. C. 434; 4 Bl. Com. 210. The statute providing for its punishment in this state—§ 5730 of Compiled Laws—is in the following words: "If any person shall ravish and carnally know any female of the age of ten years or

more, by force and against her will, or shall unlawfully and carnally know and abuse any female child under the age of ten years, he shall be punished," &c. This statute does not change the nature of the offence as it existed at the common law, nor does it describe two distinct offences; but carnal knowledge of the female child under the age of ten years is held to be rape, on the ground that, from immaturity and want of understanding, the child must be deemed incapable of assenting, and the act presumed to be the result of force: *People* v. *McDonald*, 9 Mich. 150; *Commonwealth* v. *Sugland*, 4 Gray 9. And it is insisted in this case that an insane woman, or one not mentally competent to exercise an intelligent will, is in the same position, as respects this crime, as a child under ten years of age; and that carnal knowledge of her person would constitute the offence notwithstanding her acquiescence.

If the case before us can be held to be rape, it is evident it must fall within the first clause of the section quoted, since the other is confined by its express terms to carnal knowledge of female children under the age of ten years, and cannot be extended by analogy to embrace other cases. But to warrant a conviction under the first clause of the section, the carnal knowledge must have been by force and against the will of the woman; and as there were facts before the jury in this case from which they might fairly infer that the woman, and not the man, was the soliciting party, and the charge of the judge must be construed in the light of the testimony, the real question to be determined is, whether that is by force and against the will, where the woman assented to and desired its commission, but without possessing at the time the mental capacity which would render her responsible for her own conduct.

The general rule requires not only that there should be force, but that the utmost reluctance and resistance on the part of the woman should appear: *People* v. *Morrison*, 1 Park. C. R. 625; *Woodin* v. *People*, Ibid. 464. The essence of the crime is said to be, not the fact of intercourse, but the injury and outrage to the modesty and feelings of the woman, by means of the carnal knowledge effected by force: *Pennsylvania* v. *Sullivan*, Addis. 143; 2 Bish. Cr. L., § 944; 3 Greenl. Ev., § 210. As these circumstances are wanting in the present case, it becomes ne-

cessary to determine whether any other circumstances can be regarded in the law as equivalents.

There are undoubtedly some cases where the law not only does not require actual force to be proved, but where force is presumed and not suffered to be disproved. The case of carnal intercourse with a female child under ten years of age has already been alluded to; but the rule in that case is not an arbitrary one, but is based upon a well-understood fact in nature, that the child at that tender age is wanting in sexual desire, and the presumption that it is against her will is therefore in accordance with the general fact. Nature indeed does not definitely fix the period at which the child might become capable of understanding the character of the act, and of assenting to it; and by statute the age of ten years has therefore been named as the period when the conclusive presumption of opposing will shall cease. The rule in this case, we apprehend, depends less upon mental capacity than upon physical considerations; and the age named is not the age of consent, either at the common law or by the statute. It was indeed at one time supposed that if the female was over ten years of age, but under twelve, intercourse with her must necessarily be rape, because the capacity to consent was wanting; but the courts did not so hold; and statutes were passed making the act a misdemeanor where the female was between the age of ten and the age of consent, but where, not being against her will, it did not fall within the definition of rape: 1 Hale P. C. 631; 4 Bl. Com. 212; 1 Russ. Cr. 693.

In the case of *Regina* v. *Camplin*, 1 Den. C. C. 89, s. c. 1 C. & K. 746, it appeared that the prisoner gave the woman liquor for the purpose of exciting her, but which had the effect to make her quite drunk; and while she was in a state of insensibility, he took advantage of it and violated her. The court held the act to be rape. The prosecutrix showed by her words and conduct, up to the latest moment at which she had sense or power to express her will, that it was against her will that intercourse should take place. It was no answer to the charge, therefore, that she had no opposing will at the moment when intercourse actually took place; since the prisoner had actually mastered it by means of the stupefying drug; which was the same, as was well remarked by one of the judges, as if it had been overcome by a blow.

In *Rex* v. *Chater*, 13 Shaw's J. P. 746, cited in 1 Bish. Cr. L.

§ 343, note, and 2 Arch. Co. Pl. and Pr. 167–306, the prisoner had carnal knowledge of the person of a woman laboring under delirium, and who was insensible to the act. This intercourse was held to be rape; but the decision can hardly be regarded as establishing an exception to the general doctrine as to this crime. If the woman was insensible, some degree of physical force must actually have been employed by the prisoner; and no more resistance is required by the law in any case than the condition of the woman will permit her to make.

The facts in the case last cited made it open to the objection which appears to have been taken in *The State* v. *Crow*, 10 West. Law J. 501, note to Whart. & St. Med. Jur. § 463, where the defendant was charged with the crime of rape committed upon an insane woman. That case is sometimes referred to as holding that all carnal intercourse with an insane woman is rape; but the point involved was a very different one, and the decision sanctions no such doctrine. It is not a little remarkable that while it is insisted by the prosecution in this case that *all* intercourse with a woman in this condition must be rape, because she has no capacity to consent, it was there urged by the defence that *no* intercourse with her, even by force, could be rape, because she had no will to oppose. Rape, it was said, must be against the will; and how can an act be against the will of a person who has no will? This argument made it necessary for the court to determine what is meant by the word *will*, as used by the law in this connection; and we quote from the decision so much as has a bearing upon this question. "Is it true," said the court, "that an idiot or insane person has no will? What is the meaning of these two words? Do they imply a loss of will, or a mere unsoundness of mind? These words are thus defined by Webster: 'Idiot—a natural fool; a fool from birth; a human being in form, but destitute of reason, or the ordinary intellectual powers of man.' 'Insane—unsound in mind or intellect; mad; deranged in mind;' and one of the words used to define *insanely* is *foolishly*. *Fool* is defined to be 'one who is destitute of reason, or the common powers of understanding; an idiot.' In Chitty's Med. Juris. an idiot is defined to be 'a person who has been *defective* in intellectual powers, from the instant of his birth, or at least before the mind had received the impression of any idea.' Again: Chitty says that 'idiocy consists in a defect or sterility

of the intellectual powers, while lunacy or madness consists in a perversion of the intellect.' All these definitions imply either a *weakness* or a *perversion* of the mind or its powers; not their *destruction.* Hence an idiot cannot be said to have *no will*, but *a will weakened or impaired;* a will acting, but not in conformity to those rules and motives and views which control the action of persons of sound mind. Indeed, in an insane person the will is too often fearfully active, and entirely uncontrollable by reason or persuasion. There is here no lack of will, but simply a perversion of it. Nor is this the most conclusive answer to the argument. If there is no will, how are voluntary actions continued? Actions like respiration are instinctive, and independent of the will; but eating, and numerous other acts, which necessarily imply the exercise of the will, are performed by idiots and insane persons; and their exercise demonstrates the existence of a will; of a will that can assent to or dissent from what are clearly voluntary acts. I have therefore no hesitation in holding that both idiots and insane persons are possessed of a will, so that it may be legally and metaphysically said that a carnal knowledge may be had of their persons *forcibly* and against their will."

From the brief note of the Scotch case of *McNamara*, Arkley 521, 524, in 2 Bish. Cr. L., § 939, note, a similar defence would seem to have been made there. The woman in that case was an idiot; and the court told the jury that if they believed the defendant had actually penetrated her, *and that she had shown any physical resistance, to however small an extent*, the offence would be complete, *in consequence of her inability to give a mental consent.*"

Both these cases, while not perhaps distinct authorities to that effect, clearly imply that the same circumstances must exist to constitute rape in the case of an idiotic or insane woman as where the woman is of sound mind. The word *will*, as employed in defining the crime of rape, is not construed as implying the faculty of mind by which an intelligent choice is made between objects; but rather as synonymous with *inclination* or *desire;* and in that sense it is used with propriety in reference to persons of unsound mind.

We are aware of no adjudged case which will justify us in construing the words "against her will" as equivalent in meaning with "without her intelligent assent;" nor do we think that sound

reason will sanction it. But though the definition of the offence implies the existence of a will in the woman which has opposed the carnal knowledge, no violence is done to the law by holding in any case where the woman, from absence of mental action, does not willingly acquiesce, that the physical force necessary to effectuate the purpose, however slight, is against her will. As was said by ALDERSON, B., in *Camplin's Case*, above cited, a woman may be supposed to have a general will not to be ravished; and the man is not to be excused because she was prevented, or was unable to exercise it in the particular case. If, therefore, a man, knowing a woman to be insane, should take advantage of that fact, to have knowledge of her person where her mental powers were so impaired that she was unconscious of the nature of the act, or was not a willing participator, we should have no difficulty in holding the act to be rape, notwithstanding distinct proof of opposition might be wanting. All such cases stand upon reasons which clearly distinguish them from the case now before us, where the will was active, though perverted, and all idea of force, or want of willingness, is distinctly disproved.

There are cases in which it has been held that if the woman's consent is obtained by fraud, she at the time supposing the man to be her husband, the crime of rape is not committed: *Rex* v. *Jackson*, Russ. & R. 487; *Regina* v. *Saunders*, 8 C. & P. 265; *Regina* v. *Williams*, Id. 286; *Regina* v. *Clarke*, 29 Eng. L. & E. 542; *State* v. *Murphy*, 6 Ala. 765; *Wyatt* v. *State*, 2 Swan. 394. But there are some cases in this country to the contrary; and they seem to us to stand upon much the better reasons, and to be more in accordance with the general rules of criminal law: *People* v. *Metcalf*, 1 Wheel. C. C. 378, and note 381; *State* v. *Shepard*, 7 Conn. 57. And in England where a medical practitioner had knowledge of the person of a weak-minded patient, on pretence of medical treatment, the offence was held to be rape: *Regina* v. *Stanton*, 1 C. & K. 415; s. c. 1 Den. C. C. The outrage upon the woman, and the injury to society, is just as great in these cases as if actual force had been employed; and we have been unable to satisfy ourselves that the act can be said to be any less against the will of the woman when her consent is obtained by fraud than when it is extorted by threats or force.

Undoubtedly fraud would be much more readily inferred in a case of mental derangement than where the woman's powers of

mind were unimpaired; but in the present case no circumstance of either fraud or force was required by the charge of the court to the completion of the offence; nor is it suggested that any such circumstance existed. The naked fact of intercourse, with knowledge of the mental condition, was held sufficient. As one who has knowledge of the facts which prove insanity must be supposed to know that insanity exists, it would follow that in any case of doubt a man's guilt or innocence would depend upon the final judgment of a jury upon the preponderance of testimony on the question of the woman's mental capacity. As marriage with an insane person is void, it might become a serious question whether the ceremony could protect the too partial bridegroom from prosecution for rape, where he had relied upon manifestations which to him appeared the evidences of genius, but which experts should convince a jury were only the vagaries of a disordered imagination.

The conclusion at which we have arrived is, that rape, at the common law or under our statute, is not committed upon the person of a woman over ten years of age, where no circumstance of either force or fraud accompanies the carnal knowledge. The Circuit Court must be advised that in the opinion of this court the conviction was erroneous, and that the verdict should be set aside and a new trial granted.

Supreme Court of New York.

Second District, General Term, February 1866—SCRUGHAM, LOTT, and BARNARD, Js.

NODINE *v.* DOHERTY.

Injury received by horses and carriage through negligence may be recovered, though let by plaintiff to defendant for use declared unlawful by the Sunday Act.

The hire of horses and carriages let on Sunday to be used to ride to a place known as a place of resort for pleasure, cannot be recovered, being let for a purpose made unlawful by statute.

PLAINTIFF let a pair of horses and carriage to defendant on Sunday, defendant saying at the time of hiring that he wanted to take his wife and family to Coney Island; this was all that was said at the time of hiring. The defendant left the horses standing in